

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK DALE FONTROY, et al., : CIVIL ACTION
Plaintiffs :
v. :
GOVERNOR MARK S. SCHWEIKER, et al., :
Defendants : NO. 02-2949

**DEFENDANTS' REPLY TO PLAINTIFF WHEELER'S RESPONSE
TO THE MOTION TO DISMISS FOR MOOTNESS OR FAILURE
TO EXHAUST ADMINISTRATIVE REMEDIES**

Plaintiff Wheeler has filed a response to Defendants' Motion to Dismiss for Mootness or Failure to Exhaust Administrative Remedies. He argues that the "Amended Complaint" that Plaintiffs attempted to file in August 2002 challenged the Department of Corrections policy on mail from attorneys and courts that went into effect on September 30, 2002. He also claims to have exhausted administrative remedies regarding the September policy. However, he is wrong on both counts.

The Amended Complaint (Document #16) did contain some allegations regarding policy on mail from attorneys and courts. ¶¶ 36-53. However, the allegations were the same as those in the original Complaint. They attacked the policy that was to go into effect June 24, 2002. Indeed, the Amended Complaint was dated by the Plaintiffs August 28, 2002, but the September 30, 2002 policy was not even published until September 1, 2002. Defendants argue that claims regarding the policy that was once to go into effect on June 24, 2002 are moot. That policy never went into effect.

Plaintiff Wheeler lists several grievances that he claims he filed regarding mail policy. Response, ¶ 4. The only grievance that he claims to have taken to the final step, the Office of Grievances and Appeals, is No. GRA-20379. The Second Declaration of Tshanna Kyler, filed with this Reply, presents the documents on that grievance. The grievance did not grieve anything about the DC-ADM 803 that went into effect on September 30, 2002. It attempted to grieve the policy that was to go into effect June 24, 2002. The grievance was rejected because the policy was not in effect at the time the grievance was submitted. Of course, it never went into effect. Even if Plaintiffs now have grievances pending regarding the current DC-ADM 803, those grievances cannot amount to the exhaustion of administrative remedies necessary as a prerequisite to this action. The Court must dismiss an action where the inmate plaintiff did not exhaust administrative remedies before filing suit, even if he was in the process of doing so when suit was filed. *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002).

The Court should grant Defendants' Motion to Dismiss for Mootness or Failure to Exhaust Administrative Remedies.

D. MICHAEL FISHER
ATTORNEY GENERAL

BY: s/ John O.J. Shellenberger
John O.J. Shellenberger
Chief Deputy Attorney General
Identification No. 09714

OFFICE OF ATTORNEY GENERAL
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107-3603
Telephone: (215) 560-2940
Fax: (215) 560-1031

CERTIFICATE OF SERVICE

I, John O. J. Shellenberger, hereby certify that the foregoing Defendants' Reply to Plaintiff Wheeler's Response To The Motion to Dismiss For Mootness or Failure To Exhaust Administrative Remedies has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that true and correct copies of the foregoing Defendants' Reply to Plaintiff Wheeler's Response To The Motion to Dismiss For Mootness or Failure To Exhaust Administrative Remedies were mailed on January 21, 2003 by first class mail, postage prepaid, to:

Derrick Dale Fontroy, AY-7513;
Theodore B. Savage, CB-2674;
Aaron Christopher Wheeler, BZ-2590
State Correctional Institution
at Graterford
P.O. Box 244
Graterford, PA 19426-0244

James S. Pavlichko, DK-0199
State Correctional Institution
at Mahanoy
301 Morea Rd.
Frackville, PA 17932

D. MICHAEL FISHER
ATTORNEY GENERAL

BY: s/ John O.J. Shellenberger
John O.J. Shellenberger
Chief Deputy Attorney General
Identification No. 09714

OFFICE OF ATTORNEY GENERAL
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107-3603
Telephone: (215) 560-2940
Fax: (215) 560-1031